Q&A State of the Jury

Conversation With Judge Robert A. Dukes

Judge Robert A. Dukes
Superior Court of Los Angeles County

As assistant presiding judge of the Superior Court of Los Angeles County, Robert A. Dukes is in a unique position to gauge the effectiveness of the jury system in California. After all, his court handles more trials in one day than many counties see in a year.

Not only has Judge Dukes been able to see the jury system from the perspective of a judicial administrator, but he has observed it as a courtroom participant for more than 25 years. He began his legal career as a deputy district attorney in Los Angeles in 1976 before opening a private law practice. He started his judicial career at the Ponoma Municipal Court (Los Angeles County) in 1987 and was elevated to the superior court in 1989.

In 2001 Chief Justice Ronald M. George appointed Judge Dukes to the Judicial Council, where he currently serves as liaison to the Task Force on Jury System Improvements.

Court News *spoke with Judge Dukes about jury service and the state of the jury system in California.*

When the Blue Ribbon Commission on Jury System Improvement issued its report in 1996, it concluded that "the jury system in California is on the brink of collapse." Is it still on the brink?

Let me first say that we are now poised as a judicial branch to make great improvements in the handling and care of jurors.

But in previous years, in response to some significant, high-profile trials, there was great criticism lodged against the jury system in general and specifically in California. As a result, the blue ribbon commission was formed to look at the then-current jury system and make suggestions for its improvement. The commission's report contained close to 50 recommendations that focused on how the courts could improve the summons process to increase the numbers of individuals that reported to jury service and how to make it more efficient and palatable to those summoned.

One of those recommendations was that the judicial branch implement a one-day or one-trial jury system, which has now been mandated in all the courts. The charge of the Task Force on Jury System Improvements is to look at additional recommendations from the commission, figure out which ones should be implemented, and suggest how to do it.

What are the priorities of the task force? What are some of the jury system improvements now in the works?

[Superior Court of Riverside County] Judge Dallas Holmes, who chairs the task force, is very excited about the work that is being done.

The task force has broken its charge into three different areas. First, it is looking at how to get more potential jurors into the courts. It is poised to make recommendations on the look and feel of jury summonses to make them more user-friendly and more consistent statewide. It is also addressing the common view, held by many citizens, that nothing will happen if they ignore the jury summons.

The task force is also examining how we treat jurors once they enter the courtroom. Unbelievably, some judges are still resistant to juror note-taking during trials. Other possible suggestions include the use of mini-opening statements to clarify for jurors what the trial system is about and encouraging the reopening of arguments to address concerns that may lead to a hung jury.

In addition, the task force is looking at how to encourage the public, the business community, and the state to help make jury service more economically feasible. A recent study conducted in New York state revealed that the average person is not resistant to jury service on the basis that he or she doesn't understand or believe that jury service is an obligation of citizenship and the foundation of our judicial system; the resistance seems to be that they can't afford it. The $15 per day California jurors receive would lead me to believe they feel the same way.

Isn't jury service a duty? If so, does the judicial branch have an obligation to those summoned, to improve the system?

One of the things we've learned as a judicial branch is that, in order to maintain independence, we have to be held accountable. We have to be able to do some critical self-analysis and respond back to our constituents, the Legislature, and—on a trial court basis—back to the Judicial Council.

We have a responsibility to jurors to advocate on their behalf; to educate the public and Legislature as to the need for jury service; and to try to address concerns that citizens raise about service into which they are being pressed.

When sworn in, jurors become part of the government and the judicial system. The bottom line is that jurors are judges. They are judges of the facts just as judicial officers are judges of the law. As judges, we demand to be treated in certain ways. We would not stand for a lack of sufficient compensation or a lack of appropriate decorum and demeanor in how we are treated. Nor should we allow jurors, as fellow judges, to suffer through the same type of indignities.

What challenges has your county (Los Angeles) faced in improving jury service, especially in the implementation of the one-day or one-trial jury system?

We were very concerned when the one-day or one-trial jury system was mandated because of the number of trials we handle on a daily basis and the amount of jurors needed for those cases. In Los Angeles County we bring between seven and ten thousand potential jurors to our courthouses every day.

We contracted with the Rand Corporation, the University of Southern California, and the National Center for State Courts to analyze whether we could fulfill the obligations under this new system. After running several computer models and studies, their report showed that, without changing other aspects of our current jury system, we would be unable to implement the one-day or one-trial system.

One of the reasons for this conclusion was our low yield of potential jurors for our downtown courthouses. These facilities host more than 30 percent of our trials but bring in just over 10 percent of the total jurors they summon. To help address this situation, we have publicized and increased our sanctions program for jurors who fail to respond to their summonses. We are scheduling more than 10,000 sanction hearings a month. We can no longer let citizens think they can toss the jury summons in the trash with impunity.

The analysis also revealed that we could be more efficient in our use of jurors who did show up for service. Many attorneys were using jury panels and the threat of trial as a means to settle cases. Meanwhile, the jury panel never saw the inside of the courtroom. One of the policies we implemented to address this situation is that a judge now has 20 minutes to actively engage a jury panel that has been ordered. If it is not engaged in that time, the panel is pulled away from the judge and rotated to another courtroom. No longer do jurors have to languish in hallways while judges and attorneys attempt to settle cases.

We believe that if we can increase our yield of prospective jurors and make more efficient use of them, then we will be able to fully meet the mandates of the one-day or one-trial system. In fact, our goal is to give citizens two or three years between service.

By most accounts, the patriotic surge that followed September 11 hasn't had much effect on the response rates to juror summonses. Any thoughts on how to translate the new patriotism into civic actions such as jury service?

One of the judicial branch's responsibilities is to continue its community outreach efforts to educate businesses, employers, schools, and the public on the need for jury service and how essential it is to our justice system.

We have found that people who actually serve as trial jurors become advocates for the system. But due to the process, between 70 and 90 percent of those summoned for jury service never sit on a jury. They either are never called to a panel or are excused during voir dire.

However, those courts that implemented one-day or one-trial three years ago are getting a greater response to their jury summonses. We are also finding jurors are coming into the courthouse with much less anxiety and anger. Word has spread within those communities about the efficiency of the new system. I would also hope that the word is getting out that jury service is not something that should be feared or resisted.

How do you foresee jury service changing, if at all, in the next decade?

I think the judicial branch will go a long way toward improving jury service by taking responsibility for advocating for a pay raise for jurors, improving our treatment of them in jury assembly rooms, and providing them with additional assistance during trial.

I hope that someday jurors will want to fulfill their civic obligation to report to jury service. At that point, neighbors greeting each other in the market will not be discussing how to get out of jury duty; rather, they will be agreeing about what a fine experience it is to serve the justice system. ■

Exercising Section 1385 Discretion in Prop. 36 Cases

Just as a court may exercise its discretion under Penal Code section 1385 to dismiss a prior strike in order to avoid the consequences of the three-strikes law and make a defendant eligible for probation, a court also may dismiss a strike to make a defendant eligible for treatment under Proposition 36. Once the strike has been eliminated, there is no need for the defendant to comply with either of the two conditions of the five-year "window" period in section 1210.1(b)(1). (*In re Varnell* (2002) __ Cal.App.4th __ [02 D.A.R. 543].)

In *Varnell* the defendant had been convicted in October 1995 of assault with a deadly weapon—a strike; he was released from prison on that charge in June 1998. His current conviction of felony drug possession occurred in May 2001. He was not eligible for Proposition 36 treatment since, because of his prior strike, he had not remained free of prison custody for a period of five years prior to the current crime. (Pen. Code, § 1210.1(b)(1).) The trial court denied defendant's request to dismiss the prior strike, believing it did not have the authority under section 1385 to make the defendant eligible under Proposition 36.

The Court of Appeal reversed. Relying in part on the reasoning of *People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, the court found nothing in the language of Proposition 36 that expressly or impliedly prohibited the use of section 1385. The court found the use of section 1385 to qualify a defendant for sentencing under Proposition 36 consistent with the underlying purposes of both statutes. Once the strike is dismissed from the defendant's record, the defendant need not show that he was free of convictions and prison custody for five years prior to the current crime.

CRIME and PUNISHMENT

Much less clear is the court's authority under section 1385 to "dismiss" a strike or other disqualifying facts that have not actually been pled but exist in the defendant's record—as in *Varnell*, which concerns a *charged* prior strike in a felony pleading. Section 1385 addresses the court's authority to dismiss "actions." Appellate interpretation of the statute has extended the court's authority to include dismissal of charged prior convictions *(People v. Superior Court (Romero), supra)*, special-circumstance allegations (*People v. Williams* (1981) 30 Cal.3d 470), and most enhancements (*People v. Bradley* (1998) 64 Cal.App.4th 386). In each instance, the court struck or dismissed specific allegations or findings "in the interest of justice." No reported decision has addressed the court's authority under section 1385 to dismiss factual circumstances in the defendant's background that are not part of a pleading.

Nothing in Proposition 36 requires the district attorney to affirmatively plead disqualifying circumstances. While it is likely that prior strikes will be pled in felony drug cases, such may not be the normal practice in misdemeanor prosecutions. A prior strike may not be discovered until the sentencing proceeding. Similarly, Proposition 36 does not require the district attorney to plead a defendant's disqualification because of two prior drug convictions and two courses of drug treatment. (Pen. Code, § 1210.5(b)(5).) May a court exercise discretion under section 1385 to "dismiss" one or more prior drug convictions to retain the defendant's eligibility for treatment under Proposition 36?

Language in *Varnell* suggests that the court may have the authority to strike "historical facts" that are part of the defendant's personal history. Citing *People v. Garcia* (1999) 20 Cal.4th 490, 499, *Varnell* observes: "*Garcia* thus reaffirms that section 1385 empowers trial courts to disregard certain historical matters for purposes of imposing a particular sentence while confirming that such judicial action does not alter defendant's personal history for consideration in other contexts.... Nothing in *Garcia* supports the People's contention that 'historical facts' may never be disregarded for sentencing purposes. Such a position, if adopted, would eviscerate section 1385. Indeed, the very purpose of section 1385 is to permit courts to disregard certain 'factual allegations relevant to sentencing.'" (*In re Varnell*, *supra*, __ Cal.App.4th __.)

If courts do not have the authority to dismiss unpled disqualifying factual circumstances, it would seem to follow that the parties and the court never could enter into a stipulation that the defendant was eligible for Proposition 36; the "historical facts" always would disqualify the defendant as a matter of law. Such a conclusion seems inconsistent with the purpose of section 1385—to allow courts to act in the interest of justice. It also seems illogical to allow courts discretion to dismiss when facts are pled but restrict that discretion when facts are not pled.

Courts must be precise in their manner of exercising discretion under section 1385. Specifically, courts must indicate whether the strike is being dismissed for all purposes or only to qualify the defendant under Proposition 36. (See *id.*, fn. 14.) The difference will have great significance for a defendant whose probation ultimately is revoked. If the strike allegation is dismissed from the case for all purposes, it probably may not be used later if the defendant violates probation. In such circumstances the court likely will be limited to a sentencing scheme based on the defendant's status as of the date of the original sentencing. If, however, the dismissal is limited to meeting the qualifications under section 1210.1, the strike probably can be used in calculating the final state prison sentence.

Varnell addressed the authority of courts to dismiss prior strikes. Nothing in the opinion suggests that its logic would not apply to the authority to dismiss other disqualifying factors, such as use of a firearm (Pen. Code, § 1210.5(b)(4)) or another charged non-drug-related crime (§ 1210.1 (b)(2)).

Author's Note: At the time of publication of this article, Varnell *had been granted review by the California Supreme Court.* ■

Judge J. Richard Couzens, Superior Court of Placer County

Judge Couzens is a former member of the Judicial Council and past chair of its Criminal Law Advisory Committee.

Making Prop. 36 Work

Representatives from the worlds of criminal justice and substance abuse treatment joined together to discuss the implementation of Proposition 36 at a statewide conference in San Diego March 25–27.

The conference theme, "Making It Work!," has been the unofficial motto of those assisting in the implementation of the proposition, which was passed by voters in November 2000 and became effective July 1, 2001. The initiative generally prescribes treatment rather than incarceration for nonviolent drug offenses.

The second annual conference was coordinated by the California Department of Alcohol and Drug Programs and the Department of Psychiatry's Addiction Training Center at the University of California at San Diego. It was attended by judges, court administrators, district attorneys, public defenders, treatment providers, probation officers, and others involved in implementing Proposition 36.

Administrative Director of the Courts William C. Vickrey helped kick off the conference by addressing the challenges of incorporating the initiative into the justice system. He highlighted the important and successful role drug courts have played in that process.

Bertice Berry, Ph.D., sociologist, author, lecturer, and educator, addressed conference participants about the important role of each organization in enhancing the lives of Proposition 36 clients.

Panel presenters demonstrated how certain counties have achieved successes in areas such as courtroom strategies, residential treatment centers, and working with the media. More than a learning experience for the participants, the conference was an opportunity for courts and county implementation teams statewide to network and discover a variety of styles of implementation and methods of problem solving.

California's judiciary was well represented at the conference. Superior Court of Santa Clara County Judge Stephen V. Manley moderated two panels that focused on issues related to the role of the courts in implementing Proposition 36. One of the panelists was Superior Court of Butte County Judge Darrell W. Stevens. Superior Court of Los Angeles County Judge Ana Maria Luna helped develop the curriculum for the conference.

All three of these judges are members of the Proposition 36 Implementation Workgroup, chaired by Judge Stevens. The goal of the workgroup, which first met in December 2000, is to help the courts effectively implement the measure.

● For more information on the conference or the workgroup, contact Nancy Taylor, 415-865-7607; e-mail: nancy.taylor@jud.ca.gov.


Cynthia Gray

Judicial Ethics and "Legal" Commissions

The American Judicature Society (AJS) recently published Ethics and Judges' Evolving Roles Off the Bench: Serving on Governmental Commissions, *an essay that examines the limits that various codes of judicial conduct place on a judge's ability to participate in governmental commissions. The essay was written by Cynthia Gray, Director of AJS's Center for Judicial Ethics.*

Following is an excerpt from that essay that presents the rules of judicial conduct in California in the context of advisory opinions from around the nation.

In general, a judge is prohibited from accepting an appointment to a government commission concerned with issues of fact or policy. (Cal. Code Jud. Ethics, Canon 4C(2).) However, commentary to Canon 4B notes:

> As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice.

Therefore, as an exception to the general rule, Canon 4C(2) allows a judge to accept appointment to a governmental commission that is concerned with issues of fact or policy related to "the improvement of the law, the legal system, or the administration of justice." (Canon 4C(2).)

However, "facets of almost every social problem facing today's society will play themselves out in the courts," and efforts to solve those problems will "have an impact upon the courts." *(Massachusetts Advisory Opinion 98-13.)* Moreover, "[l]aw is … a tool by which many … social, charitable, and civic organizations seek to advance a variety of policy objectives." (*U.S. Advisory Opinion 93* [1998].) Therefore, not every issue that arises in court cases can be considered to be related to the improvement of the administration of justice. If that were the case, the exception for service on legal system–related commissions would swallow the rule prohibiting a judge from being a member of most governmental commissions.

Several advisory committees across the country have identified factors for distinguishing between legal system–related commissions that are appropriate for judicial membership and commissions that do not fall within the exception.

FEDERAL

The Committee on Codes of Conduct of the United States Judicial Conference distinguishes between activities "directed toward the objective of improving the law, *qua* law, or improving the legal system or administration of justice" and those "merely utilizing the law or the legal system as a means to achieve an underlying social, political, or civic objective." *(Ibid.)* To determine whether participation is permitted, the U.S. committee noted two factors. First, the committee limited the phrase *improving the law* "to the kinds of matters a judge, by virtue of … judicial experience, is uniquely qualified to address." Second, it stated that a judge should determine "if the beneficiary of the activity is the law or legal system itself"—in other words, if the activity "serves the interests generally of those who use the legal system, rather than the interests of any specific constituency, or enhances the prestige, efficiency, or function of the legal system itself."

The "clearest examples" of activities to improve the law, the federal advisory committee stated, are those addressing the legal process, the administration of the business of the courts, the delivery of legal services, and the codification of judicial decisions. However, noting that "[w]hether an activity benefits a specific constituency or the legal system as a whole will sometimes be a close question," the committee stressed that the question "should be answered by evaluating how closely related the substance of an activity is to the core mission of the courts of delivering unbiased, effective justice to all." Moreover, the phrase *improvement of the law, the legal system, and the administration of justice*, the committee stated, applies not just to activities related to improvements in procedures or administration but also to "activities directed toward substantive legal issues, where the purpose is to benefit the law and legal system itself rather than to benefit any particular cause or group…."

UTAH

The Utah Judicial Ethics Committee stated that the exception is limited to commissions that are primarily and directly concerned with the improvement of the law, the legal system, or the administration of justice. *(Utah Informal Advisory Opinion 98-11.)* If the nexus is less direct or is incidental or tangential, or if the permitted subjects are just one aspect of a much broader mission or focus, the committee advised, service by a judge is not permitted.

Applying its analysis to a state antidiscrimination advisory council, the Utah committee noted that the "concept of justice is broad and is certainly relevant any time discrimination is being discussed…," but concluded that "[i]t is not enough that the Committee be concerned with justice in a broader sense." *(Ibid.)* Therefore, service on a commission concerned with access to the justice system for victims of discrimination, the committee advised, would be appropriate, while service on a commission dealing with discrimination issues faced outside the legal system would be precluded.

Similarly, the Utah committee advised that a judge could not serve on a government commission charged with recommending statewide substance abuse and antiviolence policies; developing priorities for programs to combat substance abuse and community violence; and recommending executive, legislative, and judicial action based upon policy needs and identified gaps in the continuum of services. *(Utah Informal Advisory Opinion 94-2.)* However, in the same opinion, the committee approved service on a commission with the narrowly tailored mission of providing a forum for education, coordination, and communication on violence and drug-related issues that affect the total judicial system and enhance multidisciplinary cooperation while preserving judicial independence. Furthermore, the Utah committee stated that a judge may participate on a county child abuse coordinating council designed to improve the management of child abuse cases and to achieve justice for victims and perpetrators. *(Utah Informal Advisory Opinion 88-2.)* It also stated that a judge may serve on the advisory board for a program that provides a comprehensive, multidisciplinary, not-for-profit, intergovernmental response to sexual and physical abuse of children but should not participate in any discussions of issues outside the neutral administration of children's justice. (*Utah Informal Advisory Opinion 98-4* [noting that "the administration of children's justice is inherently a broader concept than the administration of justice in other areas"].)

FLORIDA

The Florida Judicial Ethics Committee noted that participation by judges on many commissions tangentially related to the justice system or the improvement of the law "has in some instances blurred the distinction between the branches of government," affecting "the public's perception of the independence of the courts from the executive and legislative branches of our governments." *(Florida Advisory Opinion 2001-16.)* Therefore, the committee concluded that a judge should not serve on a municipal children's commission charged with fiscal oversight of government funds even though "a creative justification" could be made that the commission was tangentially related to the justice system.

MASSACHUSETTS

The Massachusetts Judicial Ethics Committee stated that, to come within the exception allowing service on legal system-related commissions, a governmental commission must have a "direct nexus" to how "the court system meets its statutory and constitutional responsibilities—in other words, how the courts go about their business." *(Massachusetts Advisory Opinion 98-13.)* The committee applied its analysis to a city commission that assists communities in building partnerships with the police department and assists the police department in expanding community policing. The committee did note that "law enforcement efforts do have an impact upon the courts" but rejected an expansive reading of "the administration of justice" that would include those efforts. Service on the policing commission was precluded, the committee stated, because it focused "on how the police department goes about its business." The committee concluded that the city community policing commission had no direct involvement with "the improvement of the law, the legal system, or the administration of justice," noting that the commission's functions did not expressly mention any court or relate to such matters as the processing of criminal cases, the implementation of laws related to the court system, or proposed reform in these areas. (*Ibid.* See also *Virginia Advisory Opinion 00-6* [judge may not serve on state crime commission with duties such as gathering information, with particular reference to organized crimes; referring specific matters and information for further investigation or prosecution; recommending that a special grand jury be convened; and investigating specific criminal activity].)

CALIFORNIA COMMENTARY

That a governmental commission is related to "the improvement of the law, the legal system, or the administration of justice" does not automatically mean that a judge may serve on the commission. A judge must also consider whether service would "cast reasonable doubt" on the judge's capacity to act impartially. (Cal. Code Jud. Ethics, Canon 4A(1).) Moreover, commentary unique to Canon 4C of the California Code of Judicial Ethics requires a California judge to ask whether service on a commission would involve the courts in extrajudicial matters that may prove to be controversial, would be likely to interfere with the effectiveness and independence of the judiciary, or would constitute a public office within the meaning of the California Constitution. (Commentary to Canon 4C.)

● *For information on ordering copies of the full essay, contact Rodney Wilson, rwilson@ajs.org, or visit the AJS Web site at www.ajs.org/.* ■